

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK ROBERTS, Personal Representative of
the Estate of EDILEE KAIL ROBERTS,
Deceased,

Plaintiff-Appellant,

v

HERBERT LEROY COOLEY, DELORES MAY
QUINN and MICHAEL D. QUINN,

Defendants-Appellees,

and

TRAVIS JAMES ADAMS and ARTHUR SCOTT
ADAMS, JR.,

Defendants.

UNPUBLISHED
December 29, 2011

No. 299985
Newaygo Circuit Court
LC No. 09-019464-NI

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendants Herbert Leroy Cooley, Delores May Quinn and Michael D. Quinn pursuant to MCR 2.116(C)(10). For the reasons set forth in this opinion, we reverse.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of a motor vehicle accident that occurred on the afternoon of May 24, 2009, on a curved portion of M-37, just north of Newaygo, Michigan. The pertinent portion of M-37 is a two-lane highway with a substantial paved shoulder set off from the travel lanes of the roadway by a white fog line. At the time of the accident, the weather was sunny and clear and the road was dry. Edilee Kail Roberts was driving her motorcycle northbound on M-37. Driving southbound on M-37 was a succession of three vehicles: a truck driven by defendant Herbert Leroy Cooley, a van driven by defendant Delores May Quinn and a truck driven by defendant Travis Adams. After defendant Cooley missed a right turn into a driveway bearing a sign advertising the sale of firewood, he pulled his vehicle onto the shoulder of the road. Seeing

Cooley slowing and pulling to the side of the road, Quinn either slowed her vehicle or stopped it completely in the roadway or partially on the shoulder of the roadway. In an effort to avoid colliding with Quinn, who he perceived to be stopped in the southbound lane of the roadway as he rounded a sweeping curve, defendant Adams drove his vehicle across the double yellow center line into the northbound lane of M-37, colliding with Roberts' motorcycle and causing Roberts' death.

Plaintiff, the personal representative of Roberts' estate, filed suit against defendants. Plaintiff reached a settlement with defendant Adams and his father, defendant Arthur Scott Adams, Jr.,¹ and they were dismissed from this action. Thereafter, defendants Quinn and Cooley filed separate motions for summary disposition under MCR 2.116(C)(10). Defendant Quinn argued that reasonable minds could not conclude that she acted negligently and that her conduct was reasonable and appropriate. Defendant Cooley argued that the evidence failed to establish that he breached any applicable duty or that his vehicle was a proximate cause of Roberts' death.

The trial court granted defendants' motions. The trial court first observed that, although certain facts were disputed by plaintiff, "they were not rebutted by competent evidence to create a genuine issue of fact," and that "[a]s a result, they will be deemed established facts for evaluating" defendants' motions. These facts included that Cooley's vehicle was stopped on the shoulder of the road, outside the white fog line and off the travelled portion of the highway, when defendant Adams' vehicle crossed the centerline; that, while Cooley applied his brakes to slow his vehicle so he could pull off the roadway and stop, "he did not slam on his brakes as if he was making a panic or emergency stop"; that Quinn "was able to easily slow her vehicle to avoid hitting the rear of the Cooley vehicle"; and that Quinn's vehicle "was totally within the southbound lane" of M-37 when defendant Adams' vehicle crossed the centerline into the northbound lane of M-37. The trial court found that "the only material fact at issue [was] whether Quinn's vehicle was moving or stopped" when Adams crossed the center line, and it explained that, for the purpose of deciding the motions, it would accept plaintiff's assertion that Quinn was stopped in the roadway. In this context, the trial court identified "the only critical issue" as whether there was any "genuine issue of material fact regarding whether or not Cooley or Quinn breached their duty to use ordinary [care] in stopping their vehicles and, if so, whether any breach of duty was the proximate cause of Adams crossing the centerline into Roberts' lane of travel." The trial court noted this Court's decisions in *Hill v Wilson*, 209 Mich App 356, 359-361; 531 NW2d 744 (1995), addressing the duty to follow at a safe distance, and *Chunko v LeMattre*, 10 Mich App 490; 494-495; 159 NW2d 876 (1968), addressing the "common-law duty of ordinary care in operating a motor vehicle which would require due care in stopping," as indicating that the pertinent factors to be considered were whether Adams should have anticipated a need to make a sudden stop or whether Cooley or Quinn acted in a manner that would "make it difficult for an attentive following driver," to avoid a collision. The trial court then concluded:

¹Arthur Scott Adams, Jr., owned the truck that defendant Adams was driving at the time of the accident, and plaintiff's complaint contained a claim of negligent entrustment against him.

that neither Cooley nor Quinn did anything that should not have been reasonably anticipated by a driver following them. The road and weather conditions were such that Adams should have been easily able to avoid any collision with any of the vehicles involved in this incident. For whatever reason Adams did not make the observations that he should have made in time to properly react to the traffic conditions in front of him, and as a result, Roberts tragically lost her life. . . . [Thus,] the only viable negligence claim was against Adams.

II. STANDARD OF REVIEW

As this Court explained in *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007):

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) [only] "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

III. ANALYSIS

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The Michigan motor vehicle code specifies that "[t]he owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law." MCL 357.401(1). As our Supreme Court explained in *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967):

Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. The duty may arise specifically by mandate of

statute, or it may arise generally by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another.

Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part. [Emphasis added.]

The common law thus imposes, as a general standard of care applicable in all negligence actions, that “degree of reasonable care that would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury.” *Case*, 463 Mich at 6-7.

In addition to the common law standard of care engrafted into the motor vehicle code by MCL 257.401(1), the parties also refer to specific provisions of that code as providing a basis for a finding of negligence here: MCL 257.627(1), which requires that “[a] person driving a vehicle on a highway shall drive at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing”; MCL 257.672(1), which provides in part that “[o]utside of the limits of a city or village, a vehicle shall not be stopped, parked, or left standing, attended or unattended, upon the paved or main traveled part of the highway, when it is possible to stop, park, or to leave the vehicle off the paved or main traveled part of the highway”; and MCL 257.648(1), which provides that “[t]he driver of a vehicle . . . upon a highway, before stopping or turning from a direct line, shall first see that the stopping or turning can be made in safety and shall” signal appropriately before doing so.

Like Adams, Cooley and Quinn, too, had a duty to operate their vehicles with the degree of “reasonable care that would be exercised by a person of ordinary prudence under all the existing circumstance,” *Case*, 463 Mich at 6-7, and in the manner prescribed by the motor vehicle code. The trial court determined that there was no question of material fact that Cooley and Quinn had fulfilled this duty. However, in reaching this conclusion, the trial court impermissibly resolved questions of fact and determined the credibility of witnesses. It is axiomatic that a trial court may not make factual findings or weigh credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). And, when the evidence is conflicting, summary disposition is improper. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003). Contrary to the trial court’s conclusion, viewing the evidence in the light most favorable to plaintiff, there are questions of material fact regarding whether Cooley and Quinn operated their vehicles in a nonnegligent manner in the moments immediately preceding the accident.

Cooley testified that he was “driving along, looking for the wood, . . . and [they] started coming up on it, and somebody said that’s where the place was at, and then [they] recognized it

and [he] pulled off.” During his deposition in this case, Cooley denied stopping abruptly or “jerking over” to the road’s shoulder, and he believed that he put his blinker on before, or as he was, pulling over. However, during his testimony at a previous preliminary examination,² Cooley seemed to indicate that he “hit” his brakes when he realized he had driven past the driveway into which he intended to turn. Additionally, Cooley’s son, who was a passenger in the vehicle, testified that Cooley’s stop was “smooth but it wasn’t like it was slow It was quick, but it wasn’t to the point where he was skidding on the brakes or sliding.” Cooley’s passengers both testified that he was off the road at that time of the accident. However, Cooley acknowledged that there was a period of time, while he was slowing, that he was straddling the fog line, still partially in the travel lane of the roadway. Cooley testified that “right after [he] came to the stop, that’s when the accident happened”; that he “pretty much” heard the crash almost simultaneous with his vehicle coming to a stop and with Quinn’s van passing by him. Cooley did not know whether Quinn had to slow down in response to his actions.

Quinn testified that she “had to slow down because the car ahead of [her] was slowing down and beginning to pull off, and there was no way [she] could pass, not at that point in time, because by then, in those few seconds or few minutes whatever it was, the motorcycles were upon [them] and there was not room [to pass] and . . . [she] had plenty of room [between her vehicle and Cooley’s vehicle] so [she] just gradually slowed down.” Quinn stated that she saw Cooley’s brake lights “because he was slowing down and he was pulling off, but there were only two wheels off the road at that time so [she] could not pass,” and that she “did not have to brake hard. [She] just slightly applied the brakes.” However, Quinn’s passenger, Linda McClellan, indicated that Quinn was either stopped, pulling to a stop or was “way slowed down” in response to the actions of Cooley’s vehicle when she heard the accident happen behind them. Quinn also testified that she “figured [Cooley] was going to turn at some point,” even though “[t]here was no turn signal on.” Just after the motorcycles passed her vehicle, as she was passing Cooley’s vehicle, Quinn heard a “loud crash” behind her. Cooley was “off the road” when Quinn passed him, but she did not believe that he was completely stopped.

Adams testified that as he rounded the sweeping curve preceding the location of his collision with Roberts’ motorcycle, he was confronted with Cooley’s vehicle stopped on the shoulder of the road and Quinn’s vehicle stopped in the southbound travel lane. Cooley’s vehicle was “on the side of the roadway,” but Adams “ha[d] no idea” whether it was completely to the outside of the fog line. Adams believed that Quinn’s brake lights were on and she was “completely stopped” directly in front of him. Adams swerved to the left to avoid hitting Quinn, impacting Roberts’ motorcycle “almost immediate[ly]” as he crossed the double yellow center line. Adams’ passenger, Jacob Johnson, testified that as Adams rounded the sweeping curve,

² Adams was charged with negligent homicide based on his having crossed a double yellow center line into oncoming traffic causing Roberts’ death. However, this charge was dismissed following the preliminary examination, based on the district court’s conclusion that Adams’ actions in response to the situation presented – Cooley’s vehicle on the shoulder and Quinn’s vehicle travelling “much slower than the posted speed limit” and “in an unsafe manner” – were not criminally negligent.

Cooley was stopped on the shoulder and Quinn was stopped in the roadway. Johnson saw no apparent reason for Quinn to be stopped because there was nothing blocking her from continuing forward at an appropriate speed in the travel lane of the roadway.

Sharon Atkinson, a motorcycle rider who witnessed the accident, testified that defendant Adams crossed the double yellow line and went into the northbound lane of M-37 because he was “avoiding the van [Quinn’s vehicle] that was either slowed or stopped in front” of him. Atkinson believed that Quinn’s vehicle was partially in the roadway and partially on the shoulder; she did not believe that Quinn was utilizing any hazard lights or blinkers at the time. Kenneth Bergman, another motorcyclist who witnessed the accident, testified that Cooley’s and Quinn’s vehicles were stopped when Adams veered into the northbound lane. Bergman acknowledged that he was not really paying attention to these vehicles before the accident. Still, he stated that:

They appeared to be stopped to [him] the way that truck [that defendant Adams was driving] came shooting out from behind them. [He’d] have to say they were stopped because the way [Adams] came shooting out from behind them, if they were moving, [he didn’t] know what the hell [Adams] was doing then.

Bergman also testified that Cooley could have been stopped in the roadway or partially on the shoulder. He explained that it appeared to him that Cooley was “trying to make a turn and the other [vehicle] was stuck behind him [and] wasn’t going anywhere until that vehicle in front of [it] cleared.”

Considering this testimony in the light most favorable to plaintiff, we find there to be genuine issues of material fact precluding summary disposition regarding whether Cooley’s actions upon discovering that he had driven beyond the driveway into which he wished to turn and whether Quinn’s actions in slowing or stopping in the travel lane of the roadway were reasonable under the circumstances presented to each of them. Generally speaking, whether a party acted reasonably presents a question of fact. *Case*, 463 Mich at 7. To determine whether either Cooley or Quinn acted negligently, the trier of fact must resolve outstanding factual issues regarding the manner in which Cooley operated his vehicle upon passing his desired destination and whether he pulled completely onto the shoulder of the roadway or remained in the travel lane, as well as whether Quinn appropriately stopped or slowed in the travel lane when approaching Cooley’s vehicle. Contrary to the trial court’s determination otherwise, there was competent evidence presented, in opposition to the motions for summary disposition, from which it could be inferred that Cooley made a sudden or abrupt stop and/or that he was not completely off the travelled portion of the roadway when Quinn came upon his vehicle. There was also evidence presented from which a jury could find that Quinn responded to the presence of Cooley’s vehicle other than by “easily slow[ing] her vehicle,” and that the degree of her response was not warranted by the circumstances presented.

As Cooley’s passenger, Daniel Graber, testified, there were “a multitude of things that happened that day that led to” Roberts’ tragic death, including Cooley “being on the side of the road . . . to start the whole sequence,” Quinn’s reaction to the presence and location of Cooley’s vehicle, and Adams’ reaction to Quinn’s actions. On the record presented, it is for the finder of fact to determine whether Cooley and Quinn operated their vehicles with that “degree of

reasonable care that would be exercised by a person of ordinary prudence under all the existing circumstances.” *Case*, 463 Mich at 6-7.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder

/s/ Joel P. Hoekstra

/s/ Stephen L. Borrello